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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 779

JOSEPH PATERNO and PASQUALE MASI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

Petitioners' convictions were affirmed, *per curiam,* by the Court of Appeals without opinion (see R. 298).

JURISDICTION

The judgment of the Court of Appeals was entered April 14, 1949 (R. 299). The petition for a writ of certiorari was filed May 10, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' convictions.

2. Whether the trial judge, who did not discuss or comment upon any of the evidence, improperly rejected the requested instruction that petitioner Paterno should not be found guilty if he merely sold the counterfeit moneys to the defendant Fallen and was not to share in the profits.

3. Whether the trial court's instructions that no inference of guilt should be drawn from petitioners' failure to testify and that the indictment was not evidence of guilt were adequate.

STATEMENT

Petitioners, together with G. Richard Van Dien, Jr., Jan Richard Knight, and Herbert Crossley, were convicted (R. 6) after a jury trial in the District Court for the Southern District of Florida on an indictment in one count (R. 7-11) charging a conspiracy to possess, control and publish as true certain counterfeit $20 Federal Reserve notes with the intent and for the purpose of defrauding the United States, knowing the notes to be counterfeit, in violation of 18 U. S. C. (1946 ed.) 265 (Sec. 151 of the Criminal Code).[1]

[1] At the end of the trial the court directed a judgment of acquittal as to defendant Chester Turner (R. 6, 275); Floyd C. Fallen, a defendant who testified as a Government witness (R. 84-149), had previously pleaded guilty (R. 5); and the remaining defendant named in the indictment, James J. Roberts, was a fugitive.

Each of the petitioners was sentenced to imprisonment for seven years, to run consecutively with a sentence previously imposed in another case, and to pay a fine of $5,000 (R. 287-288, 290-291).[2] Petitioners and Crossley appealed to the Court of Appeals for the Fifth Circuit and on April 14, 1949, their convictions were affirmed, *per curiam* (R. 298).

The evidence supporting petitioners' convictions is set forth in the Argument, *infra*.

ARGUMENT

1. It is contended that the evidence showed that petitioner Paterno merely sold counterfeit money to Fallen and that petitioner Masi was only a bystander, and that since there was no proof that

[2] The indictment cited 18 U.S.C. (1946 ed.) 88 (Sec. 37 of the Criminal Code), the former general conspiracy statute, as the section under which it was drawn (R. 11). The maximum imprisonment sentence which could have been imposed under that section was two years. However, the indictment should properly have referred to Section 178a of the Criminal Code, 18 U.S.C. (1946 ed.) 294, as the statute alleged to have been violated. That section, which was added to the Criminal Code by the Act of September 27, 1944, c. 425, 58 Stat. 752, provided that persons convicted of conspiracy "to violate any provision of this chapter [Seven] * * * shall * * * be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for violating such provision." Section 151 of the Criminal Code, 18 U.S.C. (1946 ed.) 265, the provisions of which petitioners and their co-defendants conspired to violate and which was also cited in the indictment (R. 8-9), was part of Chapter Seven of the Criminal Code (see 35 Stat. 1115, 1116); and provided a maximum imprisonment penalty of 15 years. The sentences imposed were therefore within the maximum allowable under the applicable statute. The fact that the wrong conspiracy statute was cited in the indictment obviously did not mislead or prejudice petitioners and the error is therefore of no consequence. Rule 7(c), F. R. Crim. P.

either petitioner knew or even cared what disposition Fallen intended to make of the contraband after the sale, the evidence was insufficient to establish that they were parties to a conspiracy as charged in the indictment (Pet. 16-29).

The Government established that Fallen and Crossley met in West Palm Beach, Florida, early in 1947, and that Crossley indicated to Fallen that he could get anything printed that he wanted, including counterfeit money (R. 87-88). Later Fallen visited Crossley at the latter's home in Atlanta, where they again discussed counterfeit money, Crossley stating that he was going to Newark, New Jersey, in a few weeks to make a contact to get some counterfeit money (R. 89). In June or July, 1947, Fallen and his wife, together with Crossley and his wife, started for Canada, but when they reached Washington the Crossleys had to return to Georgia. Fallen and his wife continued on to New York, where Fallen made an unsuccessful effort to get in touch with Paterno by telephone. (R. 90, 135.)

Some weeks later, Crossley and Fallen went to Newark and stayed at a hotel, whence Crossley called Paterno by phone and arranged a meeting for that night (R. 91). The three of them met and discussed counterfeit money, Paterno indicating he was not sure he could get counterfeit at that time but that he would check the next day (R. 92). The next day the three met at the hotel and Paterno stated that the price would be between twenty-two

and twenty-three cents on the dollar. They met again, the following day, and when Crosley complained that the price was high, Paterno made a phone call to try to have it reduced, but with no success. Paterno thought he could get the money in a few days. He then sold to Fallen, for $2,000, forty blank New Jersey automobile title certificates. (R. 93-95.) Fallen left Newark that night and returned to Florida (R. 96).

In August 1947, Crossley and Fallen again went to Newark and contacted Paterno and on this trip they also met petitioner Masi (R. 97). Paterno said the counterfeit money was not ready; that he was having difficulty getting the ink to dry (R. 98). Masi indicated to Fallen that the printer was drunk and had not printed the notes and that he (Masi) could print them if necessary (R. 99). On this trip Fallen, after waiting about three days, gave Paterno a $1,000 deposit which was to go to the printer, and then Fallen returned to Jacksonville, Florida. After waiting there several days he called Paterno and asked for the return of his $1,000, and on August 26, 1947, Paterno sent it to him in Jacksonville by Western Union. (R. 100, 181-182.) Shortly thereafter, Crossley called Fallen, who was at a hotel in Atlanta, and told him the money was ready. Fallen immediately called Paterno in Newark, about one or two o'clock in the morning, and Paterno confirmed Crossley's message. (R. 100-101, 142.)

Fallen then proceeded to Newark by air and called Paterno from the airport. Paterno and Masi picked him up at the airport and they tried at several hotels before they were able to get a room for Fallen. At the hotel, Paterno took Fallen aside, into the bathroom, and showed him a sample of the $20 counterfeit notes which had been printed. (R. 104-106.) The second or third day after Fallen's arrival in Newark, Paterno informed him that the money would be ready that day, and Fallen obtained plane reservations for his return. While both petitioners and Fallen were at a restaurant the subject of how Fallen was to carry the money came up. Masi went out to buy a brief case and returned with a Valpack. This being too large, Masi took it back and obtained a smaller brief case. That night Paterno brought the money, in the brief case, to Fallen's hotel and then drove Fallen to the airport in Paterno's car, where Fallen boarded a plane for Spartanburg, South Carolina. (R. 106-108, 113.) For the $50,000 in counterfeit $20 bills in the brief case, Fallen paid Paterno $11,000 in genuine money (R. 109) which he had made as a sugar broker in February and March 1947, before O. P. A. controls were lifted (R. 146-147). During this last visit to Newark, Paterno told Fallen he could get very good paper like the Government used, as well as the necessary inks and printer and suggested that Fallen consider going into the counterfeiting game with him (R. 110-111).

From Savannah, Georgia, Fallen contacted defendant Roberts (R. 114), and in Jacksonville,

Florida, he talked with defendant Knight and Roberts, each of whom took $5,000 of the counterfeit notes to pass on a percentage basis (R. 114-115). In September, in Atlanta, Fallen gave defendant Van Dien $1,500 of the money to be passed on a percentage basis (R. 116-117). He also contacted Crossley in Atlanta and went with him to Cornelia, Georgia, where they delivered one of the $20 notes to a prospective accomplice, who, the next day, refused to handle the money because the notes were not of good quality (R. 118-119). About this same time, Fallen called Paterno in Newark and told him he was returning the counterfeit because it was no good. Paterno replied that he could get some of a better quality a little later on. (R. 120-121.) Fallen wrapped up about $25,000 or $26,000 of the counterfeit notes and sent them by air express from Jacksonville, addressed to Paterno in Newark with no street address (R. 120-121, 184-188). Later Paterno called Fallen in Jacksonville and said that he had not received the shipment. Fallen ascertained that it was being held at the Newark airport. He furnished the air line with Paterno's address, and later Fallen talked with Paterno by phone and Paterno advised that he had received the package and that he would get more bank notes later on. (R. 122-123.) Thereafter, in November 1947, one Collins, who was working with Government agents, arranged to meet Fallen at an auto court in Duvall County, Florida, to pick up some of the $20 notes and at this meeting Fallen was arrested with $7,740 of the counterfeit $20 bills

in his possession, as well as the New Jersey title certificates referred to above (R. 80-82, 126-129).

A conspiracy is seldom, if ever, susceptible of direct proof. The mutually implied agreement is generally a matter to be inferred from the acts and statements of the persons charged. E. g., *Direct Sales Co.* v. *United States,* 319 U. S. 703, 714; *Glasser* v. *United States,* 315 U. S. 60, 80; *Oliver et al.* v. *United States,* 121 F. 2d 245, 249 (C. A. 10), certiorari denied, 314 U. S. 666; *Pearlman* v. *United States,* 20 F. 2d 113, 114 (C. A. 9), certiorari denied, 275 U. S. 549. In the instant case it is true there was no direct proof that petitioners knew what use Fallen and Crossley intended to make of the counterfeit notes (Pet. 23). But the only reasonable inferences to be drawn from the facts which were established were that petitioners knowingly joined and assisted the joint venture of Fallen and Crossley. Paterno was the active intermediary between them and the printer. He ascertained what they wanted, made the necessary inquiries, and attempted to have the price reduced when they objected to it. He took the $1,000 deposit Fallen left for the printer and returned it to Fallen when the latter, vexed by the delay, wanted it back. Paterno knew where to get in touch with Crossley when the money finally was ready. He delivered the counterfeit notes to Fallen in Newark and received payment from him, and when Fallen experienced difficulty in disposing of the notes because of their poor quality he agreed to furnish better ones at a later

date. He knew, also, where to locate Fallen when he did not promptly receive the notes Fallen indicated he was returning. He was experienced in dealing in counterfeit, having paper, inks and a printer at his command, and he must have realized that Fallen and Crossley intended to dispose of the notes as genuine money. Indeed, he was apparently so impressed with them as an outlet for the contraband he could furnish that he attempted to induce Fallen to go into the counterfeiting business with him.

Petitioner Masi, moreover, was no innocent "bystander" (see Pet. 29). He knew why the printing of the notes had not been completed and indicated he could print them himself if necessary. He was fully aware, from the discussions in which he participated, what was going on, and although he was not in the bathroom when Paterno showed Fallen the sample note, he was in the adjoining room where he was in a position to intercept any unexpected callers or to warn the others to dispose of the incriminating evidence if that should appear to be necessary. He was present the day actual delivery was made and assisted by making several trips to obtain a suitable brief case for Fallen's use in transporting the notes. In the light of the evidence it is frivolous to argue that Masi was merely an onlooker and that he and Paterno had no interest in the transaction beyond consummating a single sale. There was ample evidence to support the convictions of both petitioners as confederates in the con-

spiracy to possess and utter counterfeit money as charged in the indictment. Cf. *Direct Sales Co.* v. *United States, supra; United States* v. *Manton*, 107 F. 2d 834, 848-849 (C. A. 2), certiorari denied, 309 U. S. 664; *United States* v. *Anderson*, 101 F. 2d 325, 332-333 (C. A. 7), certiorari denied, 307 U. S. 625; *Marino* v. *United States*, 91 F. 2d 691, 696 (C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Comeriato* v. *United States*, 58 F. 2d 557, 558 (C. A. 4), certiorari denied, 286 U. S. 566.[3]

2. There is no merit in the contention (Pet. 29-33) that the trial court committed prejudicial error in refusing to give petitioner Paterno's requested instruction No. 15 (R. 285).[4] This request was not a correct statement of the law. See *Direct Sales Co.*

[3] *United States* v. *Falcone*, 311 U.S. 205, lends no support to petitioners' contentions (see Pet. 31-32). Respondents there were selling a lawful commodity, not contraband, and they knew the purchaser intended to use it to make illicit whiskey. But, as this Court pointed out (pp. 208, 211), the evidence "fell short of showing respondents' participation in the conspiracy or that they knew of it," and "it could not be inferred * * * from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators that respondents knew of the conspiracy." Petitioners here were selling contraband to be put into circulation as genuine money, and the meetings of petitioners with Fallen and Crossley were anything but casual. To the contrary, they were part and parcel of the conspiracy. This case is controlled, not by *Falcone*, but by *Direct Sales Co.* v. *United States, supra.*

[4] "15. There is evidence in this case that Fallen went to Newark, New Jersey, met Joseph Paterno there for the purpose of purchasing from Paterno counterfeit money. That Fallen did purchase from Paterno $50,000 worth of counterfeit Twenty Dollar bills for which he paid Paterno the sum of $11,000 in lawful United States currency. That Fallen induced, Knight, Roberts (the fugitive) and Van Dien to sell the counterfeit monies for him on a percentage basis. There has been no evidence offered or produced before you that Paterno had any share or interest in the proceeds which would come to Fallen from the sales or distribution made or to be

v. *United States, supra.* Moreover, it singled out certain parts of the testimony to the exclusion of others. But the court refrained from discussing or commenting upon any of the evidence, as it had a right to do. *United States* v. *Cohen,* 145 F. 2d 82, 92 (C. A. 2), certiorari denied, 323 U. S. 799. It instructed the jury affirmatively as to the applicable law when it stated what were the elements of a conspiracy and what the Government had to prove beyond a reasonable doubt to establish the crime charged (R. 264-272), and there is no suggestion that these instructions were erroneous. It was proper, therefore, for the court to deny the requested instruction, which would have particularized or imputed significance to portions of the evidence without referring to other portions which were equally pertinent. Cf. *Bird* v. *United States,* 187 U. S. 118, 132; *Lewis* v. *United States,* 295 Fed. 441, 447 (C. A. 1), certiorari denied, 265 U. S. 594; *Weiderman* v. *United States,* 10 F. 2d 745, 746 (C. A. 8).

3. Neither is there any merit in petitioners' contentions (Pet. 33-44) in respect of the trial court's refusal to give Paterno's requested instructions No. 16 (R. 286), relating to Paterno's failure to take the stand, and No. 2 (R. 281), relating to the indictment as evidence. The court, at the request of counsel for defendant Van Dien, which was inter-

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made by Fallen, Roberts, Knight, Van Dien and Crossley. If you find from all of the evidence that Paterno merely sold the counterfeit money to Fallen and was not to share in any profits made by Fallen, then Paterno is not a co-conspirator and it is your duty to find him not guilty."

posed at the end of the charge, added the statement (R. 273-274):

> A defendant has the privilege of taking the stand if he so desires, and testifying in his own behalf. They can do that if they wish. They also have the privilege, however, to elect not to take the stand and not to testify, and where, as is the case with some of these defendants that have elected not to take the stand and not to testify, that fact should not be taken to their prejudice. That is a privilege that the law gives to them, not to [illegible] on the stand.

Counsel for petitioners made no attempt to have this instruction amplified, and they rely solely on the court's refusal to give Paterno's requested instruction No. 16 as drawn. We believe that the language used by the court fully protected petitioners' rights.

Paterno's requested instruction No. 2 was also properly denied. It was unduly elaborate and repetitious, and the court's instruction (R. 259) that—

> The indictment in this case, gentlemen, is merely a formal charge or accusation against these defendants. It is not evidence and should not be weighed and considered by you as evidence.

adequately explained to the jury, in clear and simple language, the proper function of the indictment.[5]

[5] Petitioners also complain that the prosecutor, in his summation, made inflammatory statements not warranted by the evidence or any reasonable inferences arising from it (Pet. 44-48). The evidence indicated, however, that Crossley, who the evidence showed admitted that he had been a crook all his life (R. 153, 155), had had prior dealings with Paterno, an experienced counterfeiter and a source of supply for blank automobile title certificates, and it indicated further that Fallen never got back any of the $11,000 in genuine money he put up, although he returned half of the counterfeit notes. There was, therefore, a basis for the prosecutor's references to the "underworld" and to Paterno and Crossley as "partners in crime," as well as for his suggestions that Paterno and Crossley may have been taking advantage of Fallen. The remarks in question, moreover, may have been provoked by the arguments of defense counsel, which have not been reproduced in the record.

CONCLUSION

For the reasons stated we believe the decision of the Court of Appeals was correct and that the petition should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General,
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

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